Filed 8/21/19 In re S.M. CA1/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| In re S.M., a Person Coming Under the Juvenile Court Law. | |
| LAKE COUNTY DEPARTMENT OF SOCIAL SERVICES,<br>Plaintiff and Respondent,<br>v.<br>L.F.,<br>Defendant and Appellant. | A155636<br><br>(Lake County<br>Super. Ct. No. JV320398D)<br><br>**ORDER MODIFYING OPINION; AND ORDER DENYING REQUEST FOR REHEARING [NO CHANGE IN JUDGMENT]** |

BY THE COURT:

It is ordered that the opinion filed herein on July 30, 2019, be modified in the following particulars:

1. On page 17, the first sentence in the first paragraph beginning "Mother seeks reversal," is modified by adding a phrase at the end of the sentence so it reads as follows:

> Mother seeks reversal of the dispositional order without challenging the juvenile court's findings that Minor must be removed from parental custody or that Mother is not entitled to reunification services under state law.

2. On page 19, in the first sentence of the first full paragraph, the word "equating" is deleted and replaced with the word "analogizing."

3. On page 25, the first two sentences of the last paragraph beginning "As noted at the outset" and ending with "without violating the ICWA's active efforts requirement," are deleted. The deleted text is replaced with the following two sentences:

> In summary, we find substantial evidence to support the juvenile court's finding that the ICWA active efforts requirement was satisfied during the period prior to disposition. That evidence is not diminished because the circumstances also justify denying mother reunification services during the post-dispositional phase of this dependency proceeding.

The petition for rehearing filed by appellant on August 7, 2019, is hereby DENIED.

The modifications and orders contained herein effect no change in the judgment.

Dated:_____ _____

*In re S.M.* (A155636)

Filed 7/30/19 In re S.M. CA1/4 (unmodified opinion)

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| In re S.M., a Person Coming Under the Juvenile Court Law. | |
| LAKE COUNTY DEPARTMENT OF SOCIAL SERVICES,<br>Plaintiff and Respondent,<br>v.<br>L.F.,<br>Defendant and Appellant. | A155636<br><br>(Lake County Super. Ct. No. JV320398D) |

In this dependency appeal, L.F. (Mother) seeks relief from a dispositional order removing S.M. (Minor) from the custody of her parents (Welf. & Inst. Code § 300, subd. (b) and (j))[1] and denying Mother reunification services due to her failure to make a reasonable effort to treat problems that led to the removal of her three older children (§ 361.5, subd. (b)(10)). Mother challenges the juvenile court's finding that the Lake County Department of Social Services (the Department) made active efforts to prevent the breakup of her Indian family, as required by the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et seq. (ICWA). The ICWA applies in this case because Minor's parents are members of Pomo Indian Tribes; Mother is registered with Round Valley and

[1] Subsequent statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Minor's father B.M. (Father) is registered with Robinson Rancheria. We conclude that the record supports the juvenile court's finding that the ICWA active efforts requirement was satisfied here and, therefore, affirm the dispositional order.

## FACTUAL AND PROCEDURAL HISTORY

### I. Background

In September 2017, the Department received a referral that shortly after Minor was born, she tested positive for marijuana. The Department was already familiar with the family because Mother's older daughters, Crystal, Breanna and Brandy, became juvenile court dependents in 2014 (the 2014 case). Father is also the father of Breanna and Brandy. Mother's oldest daughter, Crystal, was conceived when Mother was a minor and she was sexually molested by her step-father, Eugene, who is also Father's uncle.

In the 2014 case, the Department received a referral that seven-year-old Brandy was being sexually abused by Father's 15-year-old cousin (Cousin), who was living with and being raised by Eugene and Mother's mother (Maternal Grandmother). An investigation confirmed Brandy's report that from the time she was four years old, Cousin had sodomized her more times than she could remember. The Department also determined that Mother and Father engaged in domestic violence in front of their children, and that Father had untreated substance abuse problems. The girls were removed from the custody of their respective parents, and Mother and Father received reunification services but failed to engage in their case plans. Following termination of parental rights, the girls were adopted by a family member.[2]

In the present case, when the Department received the referral about Minor's positive toxicology report, it contacted Robinson Rancheria, who declined to intervene and advised that it had no services or placement option to offer the family. The Department also attempted to contact Round Valley but was not able to reach the tribe's

[2] Eugene was bypassed for reunification services and the juvenile court terminated his visits with Crystal prior to the section 366.26 hearing. His petition for extraordinary relief challenging these rulings was denied by a different panel of this court. (*E.M. v. Superior Court*, 2015 Cal.App.Unpub. LEXIS 7294, *2.)

ICWA representative. Then it sent a social worker to the hospital who was prepared to offer services to prevent or eliminate the need to remove Minor from her parents. However, the Department concluded that removal was necessary after learning that Mother continued to struggle with the same issues that led to the 2014 case. Most notably, Mother had told the hospital that she and Minor were going to live with Maternal Grandmother, who shared a home with Eugene and Cousin. So, the Department took temporary custody of Minor and filed a juvenile dependency petition, which alleged jurisdiction under section 300, subdivision (b) [failure to protect], subdivision (g) [no provision for support], and subdivision (j) [abuse of siblings]. The Department was not able to locate a tribal placement for Minor nor was a family placement available, so Minor was placed in a non-tribal foster home.

According to the detention report, Mother denied using marijuana prior to Minor's birth, denied that any of her older children were sexually abused by Cousin, and denied that Eugene posed any threat to the safety of her children. Also, Mother gave contradictory reports about her current situation. She told a hospital social worker that she lived with Maternal Grandmother and intended to return there with Minor. Subsequently, Mother claimed she never said she was planning to live with Maternal Grandmother and maintained that she had not lived in Eugene's home for many years. Also, during an initial interview, Mother reported that she had a good relationship with Father, except when he was drinking, but a few days later, after Father was arrested and sent to jail for violating a no-contact restraining order protecting Mother, she claimed that she had not been in a relationship with Father since early in her pregnancy.

On September 20, 2017, the juvenile court ordered the Department to detain Minor. Both parents were granted twice-weekly visitation. The jurisdiction hearing was scheduled for mid-October. Meanwhile Mother continued to be evasive about her housing situation. On October 16, the social worker contacted Round Valley ICWA advocate Elizabeth RedFeather to discuss Mother's situation. RedFeather said that Mother spent a few days living in a trailer near the tribal office, but then reported to the tribe that she needed to be in Lake County so that she could visit Minor. When the social

worker asked for an address, RedFeather stated that she thought Mother was living in the area where Eugene and Maternal Grandmother had their home.

Minor's jurisdiction hearing was continued several times. On December 6, 2017, Father submitted the matter but Mother contested jurisdiction. At the hearing, Maternal Grandmother testified that Mother did not live with her during her pregnancy and, indeed, had not lived in her home since 2006. However, Maternal Grandmother was in close contact with Mother, visited her home regularly, and was available to help Mother with childcare. Maternal Grandmother denied being in a current relationship with Eugene and testified she had not shared a home with him for almost a year. Mother testified that she did not use marijuana before giving birth to Minor, she had not lived in Maternal Grandmother's home since she was 16 or 17, and she ended her relationship with Father when she was a few months pregnant with Minor. Mother denied having any contact with Eugene or Cousin and testified that she gave Eugene's address to the hospital when Minor was born because that is Maternal Grandmother's mailing address. Mother avoided answering questions about Eugene, but eventually admitted that she had a sexual relationship with him, which produced her oldest daughter. She denied that she or her children ever lived in Eugene's home. When asked if Eugene posed a danger to her children, Mother testified that he hurt her, so he could hurt her children. When asked whether Cousin molested her girls, Mother testified that it was her job to believe her daughter and her daughter told her that Cousin did not molest her. At the conclusion of the hearing, the court exercised jurisdiction over Minor, finding Mother's evidence unpersuasive.

**II. Disposition**

A disposition hearing was set for December 18, 2017. At that hearing, the court granted the Department a continuance because it needed more time to complete the disposition report. Before the matter was continued, Elizabeth RedFeather, the ICWA representative for Round Valley, objected that the Department had not followed up on her request to move Minor to a placement with a maternal great-aunt. Father objected to that proposed change because the maternal relative lived in Alturas and the six-hour drive

from Lake County would make visits too difficult. The court deferred ruling on the matter pending completion of the disposition report.

**A. The Disposition Reports**

In a January 2018 report, the Department recommended that Minor be declared a dependent and that the court bypass reunification services to both parents pursuant to section 361.5, subdivision (b)(10) (section 361.5(b)(10)) because they failed to make a reasonable effort to treat the problems that led to the termination of their parental rights in the 2014 case. The Department also proposed denying services to Father under section 361.5, subdivision (b)(13) (section 361.5(b)(13) because of his failure or refusal to participate in programs to address his long-standing, serious alcohol abuse.

The recommendation to bypass reunification services to Mother was based on evidence that she was still in denial about the fact that she and her daughter had been victims of sexual abuse and consequently she would be unable to protect Minor from similar victimization. The Department relied in part on Mother's testimony at the jurisdiction hearing in this case, when she denied that her daughter had been sexually abused and essentially admitted that the only reason she stopped going to Maternal Grandmother's home was because the Department told her to stop going there. The Department also documented interactions when Mother was either dishonest or displayed remarkable lack of insight about her history and current predicament. Unlike Mother, Father acknowledged that their daughter was sexually abused by Cousin and that Eugene was a dangerous person. Nevertheless, the Department recommended bypassing reunification services to Father because of his failure to address the domestic abuse and substance abuse plaguing his relationship with Mother. The Department acknowledged that after Father was arrested the previous September for violating Mother's restraining order, he enrolled in residential treatment, but it believed this was not sufficient effort to demonstrate that Father could reunify with Minor.

The Department reported that Minor's foster care placement was not a tribally-approved home or relative placement. It had contacted the maternal great-aunt who was willing to take the child, but she lived far from the county and could not commit to

facilitating visitation. Also, her name appeared on a Child Abuse Center Index, which required further investigation.

Because the Department recommended bypassing reunification services, it did not propose a reunification plan for either parent. However, the disposition report documents services that were provided to the family prior to disposition, which included maintaining in-person or telephone contact with each parent; supervising twice weekly visitation; and conducting twice weekly substance abuse testing. The Department also reported making reasonable efforts to assist this family by conducting a Department screening for services; referring parents to the Department's parenting class; making referrals to alcohol and other drug treatment (AOD) services at Tribal Health; making referrals to mental health counseling at Tribal Health; and providing placement services for Minor.

In late January 2018, the Department filed a supplemental report to inform the court that on January 25, a social worker familiar with this case saw Eugene and Maternal Grandmother shopping together at a local store and leaving together in the same vehicle. The incident concerned the Department because Maternal Grandmother testified at the jurisdiction hearing that she was living in a different town and that she was not in contact with Eugene. The likelihood that Maternal Grandmother was living with Eugene created a risk for Minor, should she be returned to Mother, because Maternal Grandmother testified that she saw her daughter almost every day.

**B. The Evidence Phase of the Dispositional Hearing**

Witness testimony was presented during multiple court sessions between May 3 and June 6, 2018. To facilitate our review, we include a brief summary of testimony by key witnesses in the order they testified.

**Elizabeth RedFeather**, Round Valley's ICWA representative, testified that her tribe was intervening as a party in this case. RedFeather addressed two main issues. First, the tribe wanted Minor placed in the maternal great-aunt's home. Initially, RedFeather complained that the Department failed to follow-up on her request for this change. Subsequently, she acknowledged that the Department did consider this relative placement but concluded that the 400-mile distance between Alturas and Lake County

would impede visitation. Second, on behalf of Round Valley, RedFeather opposed the recommendation to bypass reunification services to Mother. RedFeather believed Minor could be safely returned to Mother once she stabilized her housing and obtained restraining orders against Eugene and Cousin. She also testified it would be more culturally appropriate for Mother to receive services through Tribal Health, rather than other providers.

**Alfreda Gallegos** is a professional ICWA expert witness who is designated by Round Valley Indian Tribes as their preferred ICWA expert. In April 2018, Gallegos prepared a declaration making the following recommendations: (1) that the court make a finding that returning Minor to either parent would likely result in serious emotional or physical harm to the child; (2) that "[c]ontinued active efforts" be made by the Department to provide services to the parents and the Indian family; and (3) that "[c]ontinued active efforts" be made to place Minor with a family member or Indian family in a tribally approved home.

At the disposition hearing, Gallegos was questioned at length about her use of the term "continued active efforts." Her testimony was equivocal. On the one hand, Gallegos opined that there had been partial active efforts, but that the Department's obligation was ongoing. On the other hand, Gallegos testified that she believed active efforts had not been made to avoid breaking up the family because Mother had not been offered a reunification plan. Gallegos disagreed with the recommendation to bypass services to Mother because she believed Mother had demonstrated growth and progress and because Round Valley wanted Mother to receive services. Gallegos testified that although she did not represent Father's tribe, she believed that he too should be afforded services and the opportunity to reunify.

Under questioning by the juvenile court, Gallegos explained that her equivocation about whether active efforts were made by the Department in this case was due to a lack of information. She testified that she did not "have a lot of interaction with the social workers on this case," which she "normally" has. Gallegos believed that because the Department needed an ICWA expert to support its recommendation, it was incumbent on

them to reach out to her: "they take on themselves to contact me on many occasions so that we can work it out, what my testimony is going to be based on." But this case was different because her interactions with the social workers were limited and thus she did not have sufficient information to conclude that active efforts were made. According to Gallegos, "maybe there were active efforts," but she could not testify that there were.

**Mother** testified at the May 4, May 10, and May 11 sessions of the disposition hearing. On May 9 and May 11, the Department filed supplemental reports to inform the court that Mother had tested positive for methamphetamines and amphetamines on April 24, May 1 and May 11.

At the disposition hearing, Mother testified that the Department wanted to deny her reunification services because they thought she failed to follow through with their "orders" or "demands" or "requests," but Mother believed she did everything that was asked of her. She got a job at the Rancheria casino, found housing, did not have contact with Eugene or Cousin, and she told Maternal Grandmother it would be best to stay away because she was "hanging around with" Eugene. Mother denied having a friendship or any relationship with Eugene after he was convicted and went to prison for sexually abusing her. She testified that it was none of her business if Maternal Grandmother still had contact with him.

Mother recalled participating in a screening session with the Department where services were discussed, but she did not recall being offered any service other than AOD treatment due to the positive drug test when Minor was born. Mother believes she did follow through with that referral by attending a weekly support group at Tribal Health. Mother is pleased with her support group, which makes her feel confident and positive.

Mother reluctantly admitted that she refused to take a parenting course offered through the Department. She believed the class was unnecessary because she completed an eight-session parenting course at Tribal Health. Mother was more comfortable at Tribal Health and stated she would repeat their class if necessary. She also testified that she would take the Department's course if it would give her "a really high chance, strong chance" of getting her daughter back.

As far as Mother was aware, the Department did not expect her to participate in domestic violence counseling. However, she testified that she did discuss domestic violence during mental health counseling she received at Tribal Health. Mother struggled to provide details about the timing or number of counseling sessions she attended. Eventually she remembered attending two sessions in January 2018. Mother is comfortable with her mental health counselor and has discussed her history of being sexually abused during counseling. Her last appointment was in January because her counselor is busy. Mother called for an appointment a few months before the disposition hearing, and she placed additional calls the month and the week before the hearing. The counselor returned one of her calls, but Mother did not answer the phone because she was at work at the time.

Mother testified that she also participated in services offered by her family advocate, Holly Austinson. Mother began seeing Austinson when she became pregnant with Minor and continued to meet with her thereafter to talk about her goals for the future.[3]

Mother testified that she was not currently in a relationship with Father, aside from being his co-parent and visiting Minor together. She had a restraining order against him many years ago, but it was a peaceful contact order. She acknowledged that she did need that protection sometimes, when Father was intoxicated. Mother recalled two instances when Father had physically abused her. She could not remember whether domestic violence was one of the grounds for removal in the 2014 case. She knew that the Department had alleged there was a "failure to protect," but did not remember the factual allegations made against her.

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[3] Holly Austinson, a home visitor family advocate at Tribal Health, testified that she has had monthly visits with Mother since February 2017. Austinson is a support person who assists Mother with setting goals. Austinson shared her impression of Mother as a confident parent. She testified that she was surprised Minor was removed, but then acknowledged that she did not previously know that Minor had a positive drug test at birth. Austinson has not visited Mother's home, and Mother has not talked to her about her relationship with Father.

Mother testified that she does believe her daughter was sexually molested by Cousin. When asked if she previously testified that she did not believe the abuse occurred, Mother responded "I guess so," and added that she previously "was in a state of shock." When asked what has "changed today," Mother replied: "What do you mean 'changed today'? I don't have my kids, that's what changed." When pressed about the basis for her prior testimony denying the molestation occurred, Mother either could not remember or could not explain her prior position.

Expressing confidence that Minor will not be at risk for sexual abuse if she is returned, Mother explained that she is working hard to prevent anyone from harming her or her daughter. She plans to get a no-contact restraining order against Cousin and Eugene. She does not have a restraining order now because she does not know how to complete the application. She waited years to get a restraining order against Eugene because she thought nobody would believe her. Mother was adamant that she has not lived in the home of Eugene and Maternal Grandmother since she was pregnant with Crystal, but she acknowledged that Crystal lived in that home until 2014. Mother also testified that between June and December 2017, she had no contact with Maternal Grandmother, not even a phone call. According to Mother, Maternal Grandmother's testimony at the jurisdiction hearing that she and Mother were in frequent contact during this period was incorrect.

Under examination by her own counsel, Mother testified that she did not understand some of the questions that other counsel had asked her during this hearing. Then Mother confirmed that she does understand the Department's concerns about sexual abuse and domestic violence. Mother knows how to protect Minor from such harm by contacting law enforcement. Since the termination of her parental rights in the 2014 case, Mother had learned important parenting skills, such as how to comfort her child. Her services at Tribal Health include substance abuse counseling, and she also participates in drug tests on visiting days. Her tests have "generally been clean." Mother testified that she does not use methamphetamine or even know what it looks or smells like. Moreover,

nobody has told her that she tested positive for methamphetamine in a recent drug test. She did not know why she would test positive for that substance.

**Father** testified that he has an alcohol addiction that he is working on. He began drinking when he was 13 and was addicted by age 19, suffering blackouts approximately 4 times a week. He is now 33 and he had his last drink on November 23, 2017. This is the longest stretch of time that he has stayed sober, which he attributes to Minor and his desire to reunify with her. He stays sober by avoiding people he used to hang out with and attending classes. He did not have significant employment when he was drinking, but now he wants to work and make money. In early March 2018, he got a job at Robinson Rancheria working on a crew that is building a fire-line around houses on the reservation.

Father recalled that he started dating Mother when he was around 20. Prior to the 2014 case, there was a violent incident, which resulted in a criminal restraining order. A few times, Father was charged with violating the no-contact order because he was caught spending time with Mother. Father confirmed Mother's testimony that he was responsible for their two physical altercations. He also admitted that when he was drinking, he verbally abused Mother on a regular basis.

Father testified that he has long known that Eugene abused Mother, but he thought that after Eugene went to prison he would not do that kind of thing again. Nor did he have a clue that Cousin had been molesting Brandy until the Department intervened. Father testified that Eugene is his only uncle and he used to love him a lot, but things changed after the 2014 case, when Eugene sided with Cousin and even suggested that Father may have been the one who molested Brandy.

In October 2017, Father completed a residential treatment program at Ukiah Recovery Center, where he completed courses in parenting, life skills and anger management. He was sober when he got out but relapsed in November when his aunt died. Father has also completed an eight-week parenting course at Tribal Health. The Department asked him to participate in its parenting class, but he did not go because it was much farther away than Tribal Health. However, he would participate in the

Department's course if ordered to go. He is also thinking about taking education classes. Father left school after 8th grade, but his advocate at Tribal Health said he could help Father get a high school diploma.

Father has been attending a weekly church class to help him maintain his sobriety since December 1, 2017. He heard about the program from a friend and was reluctant to go but ended up liking it. The group is a positive influence in his life and offers him support.[4] From January until March 2018, Father also participated in a class at Tribal Health called Hurts and Habits and Hangups. He stopped going because he got a job but still keeps in touch. In February, Father began attending a weekly men's wellness class. He also attends AA meetings.

Under questioning from the court, Father testified that he gets tired from attending so many programs, and he does not like going but always feels better afterward. The reason he is doing all of these things now that he did not do in the past is that he does not want to die from alcohol. Alcoholism is his major problem and really the only reason he has a criminal record. He has cravings but resists them by going to meetings and thinking about his baby and his kids. He really wants to change and he tries to take one day at a time. He has changed his lifestyle and wants to be "healthy, happy, work, . . . not a drunk."

**Heather Beedle**, the Department social worker, was the final witness to testify. Beedle became the case manager for Minor's case in late October 2017. In that capacity, she held a meeting with the family to assess their needs, which involved a discussion of services that were potentially available to the parents. But, Beedle was not responsible for making service referrals as that task fell to another social worker. Beedle testified she has communicated with Mother approximately twice a week since this case was assigned to her.

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[4] James Stuckert testified that Father is an active participant in Celebrate Recovery, a Christ-centered recovery program. The group supported him when he missed a few meetings and then he started showing up again. Stuckert knows that Father participates in several programs and opined that he is serious about his recovery.

In November 2017, Beedle began work on a master's degree in Native American studies, having completed a pre-requisite course online. She testified that she did not utilize this training in the present case because by the time she took over, Mother was already enrolled in "Tribally Culturally Sensitive Services" and the Department had decided to recommend bypassing services, so there was no "case planning." Beedle interprets the ICWA active efforts requirement to mean "going above reasonable efforts to keep the Indian family together." She believes this requirement was satisfied in the present case because she "maintained case management" with Tribally Sensitive Services for Mother, which included mental health counseling, drug treatment, parenting classes and meeting with the family advocate. Also, Beedle and Mother were talking about taking Minor to Tribal Health for special visits with Holly Austinson. Finally, although Minor was not placed with a tribal family, the Department was still working on getting her into a tribally approved home.

Beedle gave different reasons for recommending that the court bypass reunification services to each parent. As to Mother, Beedle was not concerned about ongoing domestic violence because there were no incidents after the petition was filed, parents terminated their romantic relationship, and they got along well when they attended visits together. Nor did Beedle have concern about Mother's current housing situation, which met minimum community standards. Also Mother was appropriate during visits, which Beedle supervised. Nevertheless, Beedle recommended bypassing reunification services to Mother because she believed that "[M]other in the future may not protect [Minor] from sexual abuse." According to Beedle, there were no services the Department could offer Mother that would enable her to reunify because "she's gone through previous services and has not changed in order to reunify." Beedle admitted that she never asked Mother whether or not she believed her older daughters were molested. However, she observed Mother and found no indication she underwent a meaningful change since the 2014 case. Also, Mother's testimony that she had attended only a few counseling sessions was essentially an admission that she had not sufficiently engaged in this service to address the prior abuse at the heart of this case.

Beedle testified that she reviewed the 2014 case files, which show similar behavior by Mother in that she is in "denial around what had happened" and she does not attend services. During this case, Beedle told Mother she needed to participate in the Department's parenting course. Beedle thought the Department's class was important because it would address the specific reasons that Minor was removed, and she told Mother that she could also do "Tribal Parenting at the same time" or after completing the Department's course. (Emphasis omitted.) Beedle opined that even if Mother had participated in the Department's parenting course, that service was not enough for Mother to reunify because she needed counseling to address sexual abuse and her prior trauma. Beedle did not refer Mother for counseling because she was already receiving that service through Tribal Health. Finally, Mother's substance abuse was a new additional concern. Since May 2018, Mother tested positive for methamphetamine three times. Each time she denied drug use and was unable to explain why she tested positive.

As to Father, Beedle recommended bypassing reunification services because (1) when the disposition report was prepared in January 2018, a determination was made that Father failed to successfully complete treatment for substance abuse, and (2) Father failed to reunify with his older daughters. Beedle conceded, however, that since she took over this case Father never had a positive substance abuse test, that Father was engaged in substance abuse services, and that she had no current concerns about Father's substance abuse. Beedle also testified that she observed Father during visits and found him to be loving and attentive with Minor. However, Beedle articulated two ongoing concerns about placing Minor with Father: she had not seen his home; and his sobriety was relatively short-lived. Beedle acknowledged that she did not attempt to visit Father's home and did not even know where he lived. She also acknowledged that she did not speak with Father's service providers at Tribal Health.

### C. The July 16, 2018 Hearing

After the evidence phase of the hearing, the parties submitted written closing arguments. Then the court held another hearing to announce its ruling, which included the following orders: Minor was declared a dependent of the juvenile court; Mother was denied reunification services due to her failure to address the issues that resulted in her failure to reunify with her older children; and Father was granted services even though he was eligible for a bypass because providing services to Father would further the best interests of the Minor. The court also made detailed findings, three of which are particularly relevant to Mother's appeal.

First, the court found clear and convincing evidence that active efforts were made to provide services designed to prevent the breakup of this Indian family. Those efforts included services that were provided in the 2014 case, services provided through Tribal Health as facilitated by the Department, and services the Department offered but parents declined to accept.

Second, the court found that Mother was not a credible witness. The trial judge's personal observations, which were based on more than 40 years' experience doing this kind of work, were that Mother's presentation was "flat" and without emotion, and she appeared to be guarded and evasive. By contrast, the court found that Father was open, engaged, and forthright and "really persuaded the Court as to the believability of his testimony." The court stated it was even more concerned that Mother's testimony was often contradicted. As an example, the court contrasted Mother's testimony that she does not use methamphetamine with multiple drug tests taken while the disposition hearing was in progress which showed that Mother tested positive for that very drug. Mother's lack of credibility led the court to conclude that Mother was not being genuine when she retracted her denial that her older daughter was sexually abused. In reaching this conclusion, the court relied on evidence from the 2014 case, which showed that Mother had made a similar admission when faced with termination of her parental rights, but then when a new child was removed she reverted to her original position that the abuse never occurred.

Finally, the court found ample evidence in the record, which incorporated the 2014 case files, that neither parent had made reasonable efforts to eliminate the problems that led to the removal of their older children. Therefore, there were grounds to bypass reunification services to both of them. However, the court concluded that providing Father with services would serve the best interests of Minor. The court based this ruling on Father's testimony at the disposition hearing, which was persuasive and impressive. Thus, the court stated that it would adopt the Department's recommendation to deny reunification services to Mother, but it continued the matter so the Department could prepare a reunification plan and propose new findings as to Father.

**D. Additional Hearings and Rulings**

At the continued hearing on August 27, 2018, the court considered a supplemental report recently filed by the Department, which reflected that Mother continued to return positive drug tests despite denying that she used methamphetamine. Meanwhile, the Department developed a reunification plan for Father after conducting a family meeting with him and his ICWA representative.

On September 24, 2018, the court completed its Findings And Orders After Dispositional Hearing, which were recorded and filed that same day. The court adjudged Minor a dependent pursuant to section 300, subdivisions (b) and (j). It found that Minor is an Indian child and it found clear and convincing evidence that (1) continued physical custody by either parent is likely to cause the Minor serious emotional or physical damage; and (2) active efforts were made to provide remedial services and remedial programs to prevent the breakup of the Indian family and these efforts were unsuccessful. The court also found that Father was a person described in section 361.5(b)(10) and 361.5(b)(13), but granted reunification services to him because reunification was in the best interest of the child. Mother was a person described in section 361.5(b)(10) and was denied reunification services on that ground. However, the court ordered that Mother continue to receive twice weekly visitation with Minor.

## DISCUSSION

Mother seeks reversal of the dispositional order without challenging the juvenile court's findings that Minor must be removed from parental custody or that Mother is not entitled to reunification services. Instead, Mother's sole contention is that the record does not support the finding that the Department made active efforts to provide services to prevent the breakup of her Indian family. On appeal, we review that finding to determine if it is supported by substantial evidence. (*C.F. v. Superior Court* (2014) 230 Cal.App.4th 227, 239 (*C.F.*).)

### I. The Active Efforts Requirement

The ICWA implements a national policy to protect the best interests of Indian children and promote the stability and security of Indian tribes and families by establishing minimum federal standards for the removal of Indian children from their homes and the placement of these children in foster or adoptive homes, which take account of the unique values of Indian culture. (*In re Isiah W.* (2016) 1 Cal.5th 1, 7–8.) These federal requirements have been incorporated into California's dependency statute. (*In re J.L.* (2017) 10 Cal.App.5th 913, 918.)

The ICWA requirement at issue in this case provides that "[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." (25 U.S.C. § 1912(d).) The ICWA does not define the term "active efforts."

Section 361.7, subdivision (a) incorporates the active efforts requirement into California's dependency statute. Subdivision (b) further provides: "What constitutes active efforts shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian Child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers."

California courts characterize active efforts as "timely and affirmative steps [] taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy problems which might lead to severance of the parent-child relationship." (*Letitia V. v. Superior Court* (2000) 81 Cal.App.4th 1009, 1016 (*Letitia V.*).) Many courts have equated the active efforts requirement with the state law requirement that reunification services provided to parents of a dependent child must be " 'reasonable.' " (*In re Michael G.* (1998) 63 Cal.App.4th 700, 713–714; *In re C.B.* (2010) 190 Cal.App.4th 102, 134 [collecting cases].)

Section 224.1 defines some key terms used in the ICWA. An amendment to this statute that went into effect in January 2019 added subdivision (f) (section 224.1(f)), which defines " '[a]ctive efforts.' " This provision is substantially identical to a definition set forth in 25 C.F.R., section 23.2, a federal regulation implementing the ICWA that was promulgated in 2016 in order to promote more uniform application of ICWA requirements by state courts. (81 F.R. §§ 38778, 38779.)

Section 224.1(f) states, in part: " 'Active efforts' means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with their family. If an agency is involved in an Indian child custody proceeding, active efforts shall involve assisting the parent, parents, or Indian custodian through the steps of a case plan and with accessing or developing the resources necessary to satisfy the case plan. To the maximum extent possible, active efforts shall be provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's tribe and shall be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and tribe."

Section 224.1(f) also incorporates the established rule that active efforts "shall be tailored to the facts and circumstances of the case," and then provides a list of examples of what active services "may include." Examples of such conduct include: conducting an assessment of the family's circumstances; identifying services that will help overcome barriers to unification; including tribal representatives in meetings and inviting them to

participate in providing support and services; conducting a diligent search for a family or tribal placement for the minor; utilizing all available culturally appropriate family preservation strategies and tribal services; keeping siblings together when possible; facilitating visitation in the most natural setting possible; identifying community resources and making them accessible to the family; monitoring parental progress; considering alternate methods of addressing the needs of parents; and providing post-reunification services.

Mother argues that section 224.1(f) makes a fundamental change to California dependency law by adopting the federal definition of active efforts set forth in 25 C.F.R. section 23.2, and she suggests that prior cases equating the active efforts requirement to the reasonable services standard are no longer valid. We disagree with both parts of this argument. First, section 224.1(f) is consistent with section 361.7, which codifies the active efforts requirement. Both statutes set forth the essential components of an active efforts approach: case-specific assessment; consideration of the prevailing social and cultural values of the tribe; and utilizing all available resources of the Indian child's family and tribe. Section 224.1(f) compliments section 361.7 by providing concrete examples of what "may" constitute active efforts, but it does not alter the concept itself. Second, Mother underestimates the rigor of California's reasonable services standard. As compared to other states, California has a "heightened view" of what constitutes reasonable services under state law. (*C.F., supra,* 230 Cal.App.4th at p. 238, fn.7.) Analogizing this standard to the active efforts requirement does not diminish the latter but instead rejects the idea that passive efforts by a social services agency would qualify as reasonable services under California law. (*Ibid*.)

Thus, as we turn to the dispositive issue whether the Department made active efforts to provide Minor's family with services designed to prevent the breakup of the Indian family prior to disposition, we are guided by three primary considerations—the need for a case-specific assessment; the importance of the social and cultural values of the tribes; and the utilization of available resources of the Minor's family and tribes. Like Mother, we use examples in section 224.1(f) and its the parallel federal regulation as

a frame of reference notwithstanding the fact that section 224.1(f) became effective after the disposition order was entered in this case.

**II. Evidence of Active Efforts**

The record summarized above contains substantial evidence supporting the juvenile court's finding that active efforts were made to avoid breaking up Minor's family. In the 2014 case, both parents received reunification services to address many of the same issues that led to Minor's dependency. Following Minor's positive drug test at birth, the Department attempted to contact parents' tribes and intended to offer support services that would prevent having to remove Minor, but it concluded reasonably that removal was necessary because Mother was planning to live in Eugene's home and Father was still struggling with his addiction. Prior to disposition, the Department explored placing Minor with a family member but was not able to locate an appropriate placement. The Department also made referrals to Tribal Health, facilitated visitation and drug testing and offered a parenting class that was designed to address the specific issues that led to Minor's dependency.

The record also shows that the Department's efforts to provide remedial services and rehabilitation programs designed to prevent the breakup of Minor's family had not been successful by the time the court was called upon to make a dispositional ruling. Indeed, the juvenile court's finding that Minor could not be safely returned to either parent was supported by the Department reports and the testimony of the ICWA expert. Despite this setback, the dispositional order ensures that reunification services will be provided to Father and the Department will continue to facilitate visitation for Mother.

Crucially, the denial of reunification services to Mother at disposition did not preclude the juvenile court from finding that the ICWA active efforts requirement was satisfied at this juncture in the ongoing dependency proceeding. Because the active efforts mandate requires that culturally sensitive, timely and affirmative steps be taken to avoid the breakup of Indian families "whenever possible," it does not require the provision of reunification services to every parent. (*Letitia V., supra*, 81 Cal.App.4th at pp. 1015–1018; *In re K.B.* (2009) 173 Cal.App.4th 1275, 1283–1285 (*K.B.*).)

In *Letitia V.*, the court held that the ICWA does not require a juvenile court to offer reunification services to a parent who previously received active efforts to overcome a history of substance abuse in a sibling dependency proceeding, but failed to reunify. (*Letitia V.*, *supra*, 81 Cal.App.4th at pp. 1015–1018.) Invoking the principle that the law does not require the performance of idle acts, the court concluded there was no reason to duplicate services in a second case "where substantial but unsuccessful efforts have just been made to address a parent's thoroughly entrenched drug problem" in a sibling dependency proceeding. (*Id.* at p. 1016.) Thus, bypass of reunification services in the second case did not violate the ICWA, because the court relied on the active efforts made in the first case to support its finding that active efforts had been made in the subsequent dependency. (*Id*. at pp. 1017–1018.)

In *K.B.*, *supra,* 173 Cal.App.4th at p. 1284, the court extended the reasoning of *Letitia V.* to hold that the ICWA does not require active efforts either pre- or post-disposition "where the parent's history indicates the futility of offering services." That case involved a father who was a registered sex offender with a prior child molestation conviction. After sustaining allegations this father molested a half-sibling of his children in the family home, the court denied him reunification services. (*K.B.*, at pp. 1284, 1287–1288.) Affirming the order on appeal, the *K.B.* court reasoned that because father's "history clearly demonstrate[d] the futility of offering reunification services," requiring the juvenile court "to provide services to the father would be at best an idle act which would not further the legislative purposes of ICWA." (*Id*. at p. 1284.)

This case is similar to *Leticia V.* in that significant active efforts were made in a prior sibling case where parents failed to reunify, but beyond that, the Department attempted to work with Minor's parents and tribes in the present case as well. Moreover, the Department's efforts in this case exceed what was deemed acceptable in *K.B.* because here Mother was afforded services prior to disposition, including a parenting course, supervised visitation, and drug testing. The Department also made multiple referrals to Tribal Health, which was Mother's preferred service provider.

Mother contends the testimony of the ICWA expert compels the conclusion that the Department failed to make active efforts after January 2018 when it recommended bypassing reunification services to Mother. This argument rests on the erroneous premise that an active efforts finding has to be supported by expert testimony. Before a court may remove an Indian child from parental custody in any child custody proceeding, it must find by clear and convincing evidence, including testimony from a qualified expert that "continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(e); § 361, subd. (c)(6).) Gallegos did so testify. However, neither federal nor state law requires expert testimony supportive of an active efforts finding. (25 U.S.C., § 1912(d); § 361.7, subd. (a); *K.B.*, *supra*, 173 Cal.App.4th at pp. 1287–1288.)

Moreover, as a factual matter, the ICWA expert's testimony was consistent with the juvenile court finding that active efforts were made to prevent the breakup of Minor's family. It was clear from Gallegos's testimony that her concern about whether the active efforts requirement was satisfied stemmed from the fact that the Department was recommending a bypass of reunification services to Mother. But the denial of reunification services was a distinct issue, which required the court to make separate findings that are not being challenged in this appeal. Moreover, under questioning by the court, Gallegos acknowledged that she did not have the percipient knowledge to offer an opinion about whether active efforts were made by the Department.

Mother next contends that the Department failed to make an active effort to preserve her family because it insisted that she participate in a parenting class that did not incorporate her "Tribe's culture, customs, traditions, beliefs and practices." However, the social worker explained why the Department's parenting class would have been useful to Mother. Moreover, her testimony was undisputed that the Department also supported Mother taking Tribal Health's parenting course.

Mother argues the Department social worker essentially admitted that after the Department decided to recommend bypassing services, she took a passive role by failing to communicate with service providers at Tribal Health. We are concerned by evidence

that Ms. Beedle did not interface adequately with parents' service providers, which could have impaired the Department's ability to perform its reporting function leading up to the dispositional hearing. However, the hearing record shows that the court was apprised of parents' participation in services that were made available to them. Moreover, we find nothing in the record to indicate that Beedle's failure to communicate with service providers adversely impacted the quality of the services offered to this family or impeded parents from engaging in those services.

Furthermore, a proper review of the active efforts finding is not limited to a consideration of Ms. Beedle's activities; we take account of the Department's communication with the tribes throughout the period prior to disposition. The record shows that the Department opened channels of communication with both parents' tribes at the very beginning of this case. Then, it made referrals for parents to receive services at Tribal Health prior to Beedle's involvement. Moreover, the tribes received notices of proceedings throughout Minor's case, which afforded them the opportunity to participate in crucial decision-making. Finally, after the court ordered reunification services for Father, the Department met with Father and his tribal representative to create a reunification plan. These circumstances support the finding that active efforts were made to avoid having to breakup this Indian family notwithstanding that Ms. Beedle did not follow-up with the service providers at Tribal Health.

With another set of arguments, Mother takes the position that the Department's recommendation to deny her reunification services effectively precluded a finding that the active efforts requirement was satisfied because it shows that the Department did not assist Mother through the steps of a case plan to reunify with Minor. As noted previously, section 224.1(f) states that active efforts "shall" involve assisting the Indian child's parents "through the steps of a case plan. . . ." However, contrary to Mother's arguments here, a case plan is not the same thing as a reunification plan.

Section 16501.1 codifies rules for developing a case plan in a dependency case. The case plan is the "central unifying tool" for providing child welfare services. (§ 16501.1, subd. (a)(1).) It "ensures that the child receives protection and safe and

proper care and case management, and that services are provided to the child and parents or other caretakers, as appropriate, in order to improve conditions in the parent's home, to facilitate the safe return of the child to a safe home or the permanent placement of the child, and to address the needs of the child while in foster care." (§ 16501.1, subd. (a)(2).) The written case plan, which must be completed by the date of the dispositional hearing (§ 16501.1, subd. (e)), documents work by the agency to assess the needs of the family and the services that are provided to address those needs. Importantly, the case plan shall offer or provide reasonable services to make it possible for the child to return to a safe home *unless* the juvenile court makes a determination under section 361.5, subds. (b) or (e) "that reunification services shall not be provided." (§ 16501.1, subd. (b)(5).) Thus, by definition, a case plan is not a reunification plan for the parent although it may incorporate one. Reunification services are not required in all dependency cases and indeed they are prohibited in some. (§ 361.5, subd. (b).) This rule is no different in ICWA cases.

In the present case, the Department met with Mother to assess her needs and discuss services that were available to her. It also encouraged her to participate in the Department's parenting class and made referrals to Tribal Services. Ms. Beedle was in constant communication with Mother prior to the disposition hearing and she also supervised twice weekly visitation with Minor. These efforts were sufficient to assist Mother through the steps of the case plan for this family. Because the court adopted the recommendation to bypass reunification services to Mother, the case plan approved by the court at the dispositional hearing did not include a reunification plan for Mother. However, once the court ordered reunification services for Father, the active efforts mandate required the Department to assist him through the steps of his reunification plan.

Mother next argues that there is insufficient evidence that the Department performed several of the tasks listed in section 224.1 and its federal law equivalent, 25 C.F.R., section 23.2. For example, she complains that the Department did not make an active effort to elicit support for Mother from her extended family members. Preliminarily, we note that Mother mischaracterizes the examples in the statute and

regulation as requirements that apply in every case regardless of the facts. Here, Mother's ongoing contact with several family members was a primary reason that Minor was removed from the home and, therefore, the Department's active efforts obligation did not entail eliciting support from Mother's family. In any event, the Department did contact Mother's great-aunt about a potential placement for Minor. Moreover, as Mother concedes on appeal, the Department was also in touch with Minor's paternal grandmother, who adopted Mother's three older children.

By separate argument, Mother disputes that services provided to her in the 2014 case can be used to support the finding that the Department satisfied the active efforts mandate in this case. She reasons that those prior services were not provided to Minor or designed to "reunify" Minor with Mother. However, services offered in a sibling case are properly considered in a subsequent case involving the same issues that led to termination of parental rights in the prior case. (*Letitia V., supra*, 81 Cal.App.4th at pp. 1015–1018.) Mother argues that the reasons for removing Minor were fundamentally different from the reasons her older children were removed. We disagree. Although substance abuse appears to be a new problem for Mother, the primary concern of the Department and the juvenile court has always been Mother's inability to protect herself and her children from family members who pose significant dangers to them.

As noted at the outset of our discussion, Mother does not challenge the juvenile court's findings that when disposition orders were made in this case, Mother had not made a reasonable effort to address the problems that led to termination of her parental rights in the 2014 case and that reunification with Mother would not currently be in the best interest of Minor. In light of these unchallenged findings, the court had statutory authority to deny Mother reunification services without violating the ICWA's active efforts requirement. Importantly, however, the active efforts obligation is ongoing until this case is dismissed, or the Department proposes terminating parental rights as to Minor, at which time another active efforts showing must be made. (25 U.S.C. § 1912(d); § 361.7, subd. (a).) In the meantime, Mother has the option of addressing the

concerns that led the court to deny her reunification services and filing a petition to set aside that order based on a showing of changed circumstances. (§ 388.)

## DISPOSITION

The dispositional order is affirmed.

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TUCHER, J.

WE CONCUR:

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STREETER, Acting P. J.

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BROWN, J.